Supreme Court, U. S.
FILED
JUN 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1882

LARRY GLOVER CARTER and GREGORY HALL,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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LARRY GLOVER CARTER and GREGORY HALL,
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—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners Larry Glover Carter and Gregory Hall pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 28, 1976.

Opinion Below

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix, *infra*, at pp. 1a-3a.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 28, 1976. On

May 12, 1976, Mr. Justice Stewart ordered an extension of the time to file this petition for a writ of certiorari to and including June 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Raised

(1) Whether the decision below is correct in affirming a conviction under 18 U.S.C. App. § 1202(a) for possession of a firearm in commerce or affecting commerce by a convicted felon merely on proof that the firearm had traveled in interstate commerce at any prior time?

(2) Whether the decision below is correct in affirming a conviction under 18 U.S.C. § 924(c)(2) for carrying a firearm unlawfully where the sole unlawful element is the alleged violation of 18 U.S.C. App. § 1202(a)?

(3) Whether the decision below is correct in affirming a conviction for conspiracy to sell heroin in violation of 21 U.S.C. § 846 where the evidence was insufficient as a matter of law.

Statutes Involved

United States Code, Title 18

§ 924(c) Whoever—

* * * * *

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years.

App. § 1202(a) Any person who—

(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony, and who receives, possesses, or transports in commerce or affecting commerce, after the date of Enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Untied States Code, Title 21 § 846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Statement of the Case

On April 9, 1974, the Federal Drug Enforcement Administration and the Detroit Police Department launched a joint investigation by sending two individuals to 17428 Stoepel Street, Detroit, Michigan. One of the individuals, Dorothy Weisenberger, was an undercover Detroit police officer. She was accompanied by Wilbert Morgan, an informant for the Detroit Police and the Drug Enforcement Administration. They had $3,800.00 in currency and were to arrange a "purchase" of one-eighth of a kilogram of heroin.

At approximately 3 p.m., they arrived at 17428 Stoepel Street and were admitted by petitioner Gregory Hall. Morgan asked Hall where petitioner Larry Glover Carter was, since it was Carter's residence. Hall responded that he did not know where Carter was and he could not get in touch with him. Morgan then told Hall what they wanted. Hall indicated that he did not have

access to heroin and that they would have to talk with Carter later that day. At approximately 6 p.m., Morgan called Hall, who indicated that he had not spoken to Carter and told Morgan to call back again.

On Wednesday, April 10th, at approximately 9:30 a.m., Carter called Morgan, who told Carter of his desire to purchase some heroin. Carter responded that it was in storage, telling Morgan to contact him tomorrow at 17428 Stoepel Street.

Morgan wore a Kel transmitter on Thursday, April 11th when he and Weisenberger went to 17428 Stoepel Street. At approximately 1 p.m., no one answered the door so they left. They returned at 4 p.m. and again no one was home. They started to depart when they observed Carter and Hall drive up in an automobile. Morgan, an acquaintance of Carter's, introduced him to Weisenberger. They all entered the house; Morgan and Weisenberger sitting in the dining room, Carter going into the kitchen, and Hall to the living room.

Morgan then joined Carter in the kitchen. After some discussion a price was agreed upon for the heroin ($3,800.00). At this time, Hall was in another part of the house. Carter then proceeded to the bedroom where he changed his clothes and counted the money. Carter and Hall then went upstairs. After their return, Carter told Morgan and Weisenberger that the heroin was on its way and would arrive in twenty minutes.

There followed a long wait (approximately two hours). Finally, Carter told Hall to make a phone call to see what was taking so long. Hall left the room and did not return till the time of arrest. There is no evidence indicating he ever made a phone call.

Carter then called Morgan and Weisenberger into the bedroom, telling them that if the "bitch" wasn't there soon they would go get the heroin. He told Morgan to leave the room and, shutting the door behind Morgan, started to question Weisenberger as to her relationship with Morgan. He later made advances toward her. When she rebuffed him he struck her with his fist. He then pulled a gun and again questioned her. Then he struck her on the head with the butt of the gun. She screamed, causing Morgan to pound on the door. Carter opened it and threatened Morgan also.

This commotion, overheard via the Kel transmitter, caused the agents outside to enter the house and arrest both Carter and Hall. The delivery of heroin was never made nor were any drugs found. The officers recovered a .44 caliber Ruger revolver and a large sum of money.

Testimony established that the revolver was not manufactured in Michigan, but had been registered to Mr. Howard Eugene Stoneback, who purchased it in Michigan in February, 1962. He reported it stolen in 1972. It was not disputed that Carter had been previously convicted of attempted possession of a pistol in Detroit Recorder's Court and was sentenced to a fine of $1,000.00 or six months imprisonment.

Petitioner Larry Glover Carter was convicted of conspiracy to sell heroin and attempted sale of heroin in violation of 21 U.S.C. § 846, unlawfully carrying a weapon during the commission of a felony in violation of 18 U.S.C. § 924(c)(2), and possessing a firearm after having been convicted of a felony in violation of 18 U.S.C. App. § 1202(a)(1), in the United States District Court for the Eastern District of Michigan, Southern Division, after trial before the Honorable John Feikens and a jury on May 27, 1975. He was sentenced to a term of imprisonment of ten years as to the conspiracy count, ten

years concurrent as to the attempted sale, five years to run consecutively as to the § 924(c)(2) count, two years to run consecutively as to the § 1202(a)(1) count, and a three year special parole term to follow.

Petitioner Gregory Hall was also convicted of conspiracy to sell heroin in violation of 21 U.S.C. § 846 and sentenced to a term of five years imprisonment with a three year special parole term to follow.

Reasons for Granting the Writ

1. The decision below raises important and recurring problems of federal law concerning the interstate nexus necessary for conviction of possession of a firearm in violation of 18 U.S.C. App. § 1202(a).

In *United States* v. *Bass*, 404 U.S. 336 (1971), this Court was first called upon to construe 18 U.S.C. App. § 1202(a). The Court, per Mr. Justice Marshall, held that an interstate nexus is required for all three offenses proscribed—transportation, receipt and possession. Then, in Part III of the opinion, Mr. Justice Marshall discussed what nexus should be necessary with respect to possession and receipt:

> "The government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person "possesses . . . in commerce or affecting commerce" if at the time of the offense the gun was moving in interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of "receiv[ing] . . . in commerce or affecting commerce," for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce."

404 U.S. at 350 (footnote omitted).

The message of *Bass* seems clear—a contemporaneous interstate nexus is necessary for "possession", but any prior interstate movement suffices for "receipt". Yet, a number of subsequent cases have voiced concern over the authority of the statement in Part III (See Reason 2, *supra*) and much litigation has resulted. At least seven of the Circuits have addressed the issue to date.* This is a significant question of the application of the federal law which has not been, but should now be, settled by this Court. This case presents a clear opportunity to do so.

Petitioner Larry Glover Carter was convicted of possession of a firearm in violation of the statute in question. Though charged in the indictment with "possession, receipt and transporting", the government's theory was clear from the opening statement—Petitioner was "charged with . . . being in possession of a firearm that was affecting commerce." (T 12)** This was confirmed by the judge in ruling on motions during trial. (T 82)

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* Second Circuit: *United States* v. *Bell*, 524 F.2d 202 (1975); Fourth Circuit: *United States* v. *Scarborough*, 532 F.2d 753, 18 Crim L.Rep. 2439 (1976); *United States* v. *Mullins*, 476 F.2d 664, *cert. den.* 414 U.S. 839 (1973); *United States* v. *Kenner*, 508 F.2d 409 (1974), *cert. den.* 421 U.S. 917 (1975); Sixth Circuit: *United States* v. *Brown*, 472 F.2d 1181 (1973), *United States* v. *Bush*, 500 F.2d 19 (1974); Seventh Circuit: *United States* v. *Walker*, 489 F.2d 1353, *cert den.* 415 U.S. 982 (1973), *United States* v. *Horton*, 503 F.2d 810 (1974); Eighth Circuit: *United States* v. *Mancino*, 474 F.2d 1240, *cert. den.*, 412 U.S. 953 (1973), *United States* v. *Pleasant*, 489 F.2d 1028, *cert. den.*, 416 U.S. 989 (1974), *United States* v. *Kelly*, 519 F.2d 251 (1975), *United States* v. *Marihart*, 492 F.2d 897, *cert. den.*, 419 U.S. 827 (1974); Ninth Circuit: *United States* v. *Cassity*, 509 F.2d 682 (1974); Tenth Circuit: *United States* v. *Bumphus*, 508 F.2d 1405 (1975).

** Numbers designated "T" in parentheses refer to pages of the trial transcript.

Further, in his charge to the jury the judge focused only on the element of "possession." After reading the language of the statute, the judge noted:

> "Count five charges the defendant Carter with possession of a firearm after having been convicted of a felony, said firearm being received, possessed or transported in or affecting commerce. Now this crime does not require the defendant to know it was illegal for him to possess a gun. The only knowledge the defendant must have is that the weapon he did possess was a firearm. In other words, there is no requirement that the defendant knew he was violating the law by posses. ng a firearm after having been convicted of a felony; the government is only required to prove that the defendant knew that what he possessed was a firearm."

(T 145-6).

The judge went on to explain the types of possession, but at no time instructed the jury on the distinct offense of "receiving" a weapon. Not having been so instructed, the jury could not have returned a verdict based on such offense.

Thus, the issue is whether Petitioner's possession of a firearm constitutes a sufficient nexus with interstate commerce to come within the pertinent statutory language. The burden of proof was upon the Government to prove that the firearm had been possessed "in commerce or affecting commerce."

Applying Part III of *Bass*, the interstate nexus does not exist. There was no contemporaneous nexus in this case as the gun had come to rest in Michigan 12 years prior to petitioner's possession. But the Court of Appeals for the Sixth Circuit, in affirming the conviction, ruled

that any prior interstate nexus satisfied the statute as to "possession" (App., p. 2a, *infra*).

Since the decision below is irreconcilable with the only interpretation of the statute this Court has provided and the issue involves an important and recurring question of federal law affecting all defendants charged with violation of 18 U.S.C. App. § 1202(a), the grant of certiorari is warranted.

2. The decision below conflicts with the decisions of other Courts of Appeals as to the proper interpretation of 18 U.S.C. § 1202(a).

The Sixth Circuit holding is in conflict with the decision of the Ninth Circuit in *United States* v. *Cassity*, 509 F.2d 682 (9th Cir. 1974). The charge there was also listed in the conjunctive and the evidence indicated that the firearm had once been in commerce but had come to rest long before defendant's possession. The trial court found Cassity guilty of "possession" only, while the Ninth Circuit, citing *Bass*, held that the government failed to show the necessary connection with commerce and reversed. 509 F.2d at 682-83.

Moreover, the Second Circuit has adopted the Ninth Circuit's interpretation in *United States* v. *Bell*, 524 F.2d 202 (2d Cir. 1975). The government contended that the great weight of circuit authority supported the Sixth Circuit's position. The Second Circuit disagreed and after a scholarly examination of post-*Bass* cases held that the distinction in Part III of *Bass* must be followed. 524 F.2d at 206-08. And the Eighth Circuit, in *United States* v. *Mancino*, 474 F.2d 1240 (8th Cir.), *cert. den.*, 412 U.S. 953 (1973), has observed that the statement in Part III of *Bass* quoted above (p. 6) "... is not only a correct statement of the law but also the only indication which we have been given by the Supreme Court as to its interpretation of the requirement." 474 F.2d at 1242.

This interpretation flows partly from the principles of federalism espoused in *Younger* v. *Harris*, 401 U.S. 37 (1971).

> "Unlike transportating or receiving firearms in interstate commerce which have a definite federal jurisdiction flavor (see *Bass*, supra, 404 U.S. at 350 n.18, 92 S.Ct. 515), the crime of possession of a firearm is more traditionally in the realm of state court jurisdiction . . . The Bass court recognized that unnecessary intrusion upon the state's criminal processes was to be avoided and hence the greater connection of the possession crime to the interstate ingredient."

United States v. *Bell, supra*, 524 F.2d at 209.

But the Sixth Circuit has stated that the two offenses of "receipt" and "possession" may be satisfied by the nexus required for receipt since ". . . one could not very well possess a firearm without receiving it." *United States* v. *Brown*, 472 F.2d 1181, 1182 (6th Cir. 1973), *United States* v. *McCreary*, 455 F.2d 647 (6th Cir. 1972). The court's statement, while possibly factually proper, is precisely the situation Part III of *Bass* sought to avoid —the obliteration of the explicit distinction between the separate offenses as defined by the statute and this Court.

Only the Fourth Circuit, in *United States* v. *Scarborough*, 532 F.2d 753, 18 Crim.L.Rep. 2439 (4th Cir. 1976), *petition for cert. filed*, 19 Crim.L.Rep. 4037 (No. 76-1344, Feb. 3, 1976), has concurred with the Sixth Circuit's interpretation when the underlying conviction was based solely on "possession". Such holdings also deliberately blur the distinction between the separate offenses of receipt and possession as recognized by the statute and this Court.

This conflict justifies the grant of certiorari to review the judgment below.

3. The element of "unlawfulness" necessary for a conviction under 18 U.S.C. § 924(c)(2) is lacking as it was predicated on Petitioner's violation of 18 U.S.C. App. § 1202(a) alone.

Petitioner was also convicted of violation of 18 U.S.C. § 924(c)(2). An essential element of the offense is that the firearm be carried "unlawfully". In the present case it is clear that the unlawful predicate was Petitioner's alleged violation of 18 U.S.C. App. § 1202(a) as charged in Count Five of the indictment. Indeed, the trial judge so charged the jury:

> "Now with regard to that third element—that the defendant's carrying of the firearm was itself unlawful—I charge you that in order for you to find this element beyond a reasonable doubt you will have first been required to determine whether the defendant Carter is guilty under Count Five. If you do not find that the defendant Carter was carrying the weapon unlawfuly, as charged in Count Five, then this essential element would not be proved, and you would have to find the defendant Carter not guilty under this Count.

(T 150)

Since Petitioner's conviction of "possession" in violation of § 1202(a) should be reversed (See Reasons 1 and 2, *supra*), so too should his conviction under § 924(c)(2) as an essential element of that charge is now lacking. Certiorari should be granted to review the decision below under the Court's power of supervision to correct what would otherwise be a radical departure from the requirements of due process of law.

4. The evidence was insufficient as a matter of law to establish a conspiracy between Petitioners Larry Glover Carter and Gregory Hall.

Petitioners Larry Glover Carter and Gregory Hall were convicted of conspiring together to violate the federal narcotics laws. Yet the evidence, even when received in the light most favorable to the Government, establishes no more than Hall's casual facilitation of a proposed transaction between a willing seller (Carter) and a ready buyer (Morgan and Weisenberger). There is no evidence whatever of any illicit agreement, or "partnership for criminal purposes", or any kind of joint venture. Here, rather, Hall merely put the two sides in contact, conduct which plainly fails to rise to the level of conspiracy.

Hall took no further active role in the transaction other than putting the parties in contact with each other. Carter's request to make a phone call is not evidence of his ability to further the transaction or guarantee delivery.

A case squarely on point, although resting upon a less compelling factual predicate, is *United States* v. *Hysohion*, 448 F.2d 343 (2d Cir. 1971). The defendants Rimbaud and Hysohion were incarcerated in the Federal House of Detention awaiting indictment. They became acquainted with a fellow prisoner, Everett, who stated he was a big drug dealer. Hysohion, in Rimbaud's presence, told Everett they could supply him with drugs. And finally, Rimbaud and Everett agreed upon a purchase price in a later conversation.

Everett, released on bail and cooperating with the government, obtained heroin from Roupinian, the third defendant.

The trial judge found Roupinian guilty of a substantive violation of the narcotics law, but acquitted Rimbaud

thereon. All defendants were convicted of the conspiracy count. The Second Circuit reversed the convictions of all the defendants on the conspiracy charge.

The trial judge had found that Rimbaud was only a mere "casual facilitator" in acquitting him of the substantive count. The Second Circuit held that this so jeopardized his conviction on the conspiracy charge as to require acquittal on that charge also:

> "We think that the district court's finding that Rimbuad was no more than "a mere casual facilitator" negates the court's finding that Rimbaud conspired to facilitate the Roupinian-Everett sale . . . We find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between that seller, who was Roupinian, and Rimbaud.

448 F.2d at 347.

In the present case, the evidence establishes no more than Hall's casual facilitation of a proposed transaction. To paraphase the court in *Hysohion*, the fact that Hall told Morgan and Weisenberger, willing buyers, how to make contact with a willing seller does not necessarily imply that there was an agreement between the seller, who was Carter, and Hall.

Aside from his role as the go-between, Hall played no further active role in the transaction. Mere knowledge or approval, without participation, does not make one a party to a conspiracy. Mere association does not establish a conspiracy, but there must be intentional participation in the transaction with a view to the furtherance of a common purpose. *United States* v. *Bostic*, 480 F.2d 965 (6th Cir. 1973).

For a defendant to be guilty of conspiracy, "he must in some sense promote the venture himself, make it his own, have a stake in its outcome". *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). Hall's only action was to inform Carter of the inquires of Morgan and Weisenberger. After having done so, his active participation ceased. Moreover, it was clear from the outset that the transaction was not his own—he indicated he had no access to narcotics, nor did he know if any were available. Carter was the seller. Hall was not present when the deal was arranged, when the money was exchanged, nor when the later altercation arose. The evidence fails to establish that Hall had any stake in the outcome of the transaction. All the evidence pointed to an attempted sale by Carter alone.

Thus, Hall's conduct was nothing more than mere facilitation. He did no more than put the parties together. Having failed to prove otherwise, the government did not establish that Gregory Hall was a conspirator. *United States* v. *Hysohion, supra; United States* v. *Falcone, supra; United States* v. *Bostic, supra.* And it is well established that there must be at least two participants in a conspiracy. *United States* v. *Bostic, supra.* Since the government has failed to establish that Hall was a conspirator, neither petitioners' conviction for conspiracy should stand. The correctness of the decision below is therefore open to serious question as a matter of law, and the grant of certiorari is justified under the Court's power of supervision to correct such a departure from the accepted and usual course of judicial proceedings.

CONCLUSION

For these reasons certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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Certification

I hereby certify that on this 28th day of June, 1976 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

NANCY ROSNER
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APPENDIX

APPENDIX A

Opinion of the Court of Appeals

No. 75-2215

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—V.—

LARRY GLOVER CARTER and GREGORY HALL,
Defendants-Appellants.

ORDER

BEFORE: EDWARDS, MCCREE and LIVELY, *Circuit Judges.*

The defendants Carter and Hall were convicted in the district court of conspiracy to distribute heroin in violation of 21 U.S.C. § 846. On appeal it is claimed that there was insuffiicient evidence to support the jury's finding that Hall was a member of a conspiracy and that since he and Carter were the only ones named as conspirators, the convictions of both must be reversed. We are asked to hold that at most the evidence showed that Hall was a "casual facilitator," who brought a willing buyer and a willing seller together. Viewing the evidence as a whole in the light most favorable to the government as we are required to do following conviction, is is clear that there was competent evidence from which the jury could properly infer that Hall was a member of the conspiracy, albeit not the chief mover. The case of *United*

States v. *Hysohion*, 448 F.2d 343 (2d Cir. 1971), is clearly distinguishable.

The defendant Carter was also convicted of attempted distribution of heroin, unlawful carrying of a firearm during the commission of a felony in violation of 18 U.S.C. § 924(c)(2) and possession of a firearm by a convicted felon in violation of 18 U.S.C. App. § 1202(a). It is argued that there was an insufficient nexus between Carter's possession of a firearm and interstate commerce, his prior conviction of a felony having been established. Primary reliance is placed by the appellant Carter on language in *United States* v. *Bass*, 404 U.S. 336 (1971), which we are urged to read as requiring a finding that the possession of the firearm either must be in commerce or must affect commerce. This court has had the opportunity to deal with similar arguments on a number of occasions since the decision in *Bass*, and we have consistently held that movement of a weapon in interstate commerce at a time prior to its possession by the convicted felon provides a sufficient nexus to support a conviction under 18 U.S.C. App. § 1202(a). *United States* v. *Agnel Jones*, — F.2d — (6th Cir. No. 75-1817, Mar. 30, 1976); *United States* v. *Bush*, 500 F.2d 19 (6th Cir. 1974); *United States* v. *Brown*, 472 F.2d 1181 (6th Cir. 1973).

We applied the same construction to the interstate transportation requirement of 18 U.S.C. § 922(h) in *United States* v. *Barrett*, 504 F.2d 629 (1974), which was affirmed by the Supreme Court of the United States *sub nom. Barrett* v. *United States*, — U.S. —, 44 U.S. L.W. 4050 (Jan. 13, 1976).

We also find that the instructions to the jury were sufficient to permit a conviction either for receipt or possession of a firearm. Having determined that the

conviction under 18 U.S.C. App. § 1202(a) was valid, it follows that the conviction for unlawfully carrying a firearm during the commission of felony in violation of 18 U.S.C. § 924(c)(2) must also be affirmed under the evidence in this case.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk
By /s/ GRACE KELLER
GRACE KELLER
Deputy Clerk